No. 84-782

In The

Supreme Court of the United States

October Term, 1984

STATE OF SOUTH CAROLINA, et al.,
Petitioners,

v.

CATAWBA INDIAN TRIBE OF SOUTH CAROLINA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT TRIBE'S BRIEF IN OPPOSITION

DON B. MILLER
Counsel of Record
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JEAN H. TOAL
BELSER, BAKER, BARWICK, RAVENEL, TOAL & BENDER
1213 Lady Street, Suite 303
Columbia, SC 29211
(803) 799-9091

ROBERT M. JONES
123 Workman Street
Rock Hill, SC 29730
(803) 327-1179

MIKE JOLLY
RICHARD STEELE
113 West Main Street
Union, SC 29379
(803) 427-8471

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

(1) Whether Congress intended the 1959 Catawba Division of Assets Act, which was specifically drafted to leave the Catawba Tribe's Treaty claim unaffected, to nonetheless have the effect of implicitly terminating the claim—thereby denying the Tribe its first and only opportunity to present its claim to the courts and repudiating an express agreement with the Tribe by the Department of the Interior and the Tribe's Congressman that the bill they drafted would not be used to deny the Tribe its day in court.

(2) Whether Congress intended the 1959 Catawba Division of Assets Act, wherein Congress specifically provided for the distribution among tribal members of 3,434 acres acquired administratively in 1943, to have the additional effect of terminating, without mention, the federally-protected status of an additional 140,000 acres which comprise the Catawba Tribe's 1763 Treaty Reservation.

TABLE OF CONTENTS

INDEX—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

CONSTITUTION, TREATIES, STATUTES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATEMENT OF THE CASE

I. Nature Of The Case

In 1760 and 1763, the King of England entered into treaties with the Catawba Indian Tribe whereby the Tribe ceded vast portions of its aboriginal territory in return for being secured in possession of a 15 mile square reservation. In 1840 the State of South Carolina, without federal participation or approval, negotiated a "sale" of the Reservation, promising it would purchase a new reservation for the Tribe. South Carolina took possession of the Treaty Reservation but failed to acquire a new reservation for the Tribe. In 1842, after the Tribe had wandered homeless for almost three years, the State bought back a 630-acre tract of the original Reservation as a "new" reservation for the Tribe. The State continues to this day to hold this tract in trust for the Tribe.

In 1980, after more than 80 years of unsuccessful efforts to resolve its claim legislatively and administratively[1] the Tribe brought suit seeking the return of its Treaty Reservation. The Tribe seeks a declaration that it acquired a recognized property right through its treaties with the King and that since the adoption of the Constitution, its reservation lands have been protected by federal law. As a result, the 1840 Treaty between the State and the Tribe is void and the subject lands retain to this day their status as an Indian reservation.

---

[1]For example, the Catawba Tribe twice petitioned the Department of the Interior, in 1905 and 1908, to take legal action to resolve the Tribe's 1763 Treaty claim. The Tribe's petitions were based on the Nonintercourse Act but were rejected because the Catawbas were "state Indians" for whom the United States had no responsibility. Appeals Record at 185, 189.

II. The Proceedings Below And The Issues For Review

The district court, on agreement of the parties, initially postponed filing of answers to the complaint until after resolution of the Tribe's motion to certify the defendant class. Thereafter, the district court stayed consideration of the motion to certify the defendant class in favor of first considering petitioners' motion for summary judgment based solely on the effects of the 1959 Catawba Division of Assets Act. 73 Stat. 592, 25 U.S.C. §§ 931-938 (1976). The district court then granted summary judgment for petitioners by adopting verbatim their proposed findings of fact and conclusions of law.

For purposes of the summary judgment motion, petitioners assumed that, until the effective date of the 1959 Act, the Catawba Tribe possessed a vested, constitutionally-protected property right in its Treaty Reservation. They further assumed that the Reservation was subject to the same federal constitutional and statutory protection as other federal treaty reservations and that neither the Tribe's property interest nor its federally-restricted status was validly disturbed until 1959.

The question thus presented for summary judgment was whether the 1959 Act had the effect of implicitly terminating the federally-protected status of the 1763 Treaty Reservation by a general application of state law or by implicitly ratifying the 1840 state treaty.

III. Statement Of Facts

The 1959 Act of Congress at issue here ended a unique and limited relationship undertaken in 1943 between the State of South Carolina, the United States and the Catawba Tribe. In that year the United States, the State and the Tribe entered into a Memorandum of Understanding for the purposes "of promoting the rehabilitation of the said Indians," Mem. of Understanding, p. 1, Appeals Record at 309, and "insur[ing] the members of the Catawba Indian Tribe all the rights and privileges of any other citizen of South Carolina," Mem. of Understanding, p. 3, Appeals Record at 311. The limited nature of the 1943 relationship is demonstrated clearly by the Committee Report on the 1959 Act:

> Efforts were made to bring the Catawba Indians under Federal jurisdiction during the 1930's when their plight was especially aggravated by the general depression. These efforts culminated in a memorandum of understanding approved on December 14, 1943, in which the Indians, the State, and the Bureau of Indian Affairs each agreed to take certain actions to alleviate the Catawbas' depressed economic condition. The agreement did not specify that the Federal Government was assuming guardianship of these Indians, and neither the Indians nor the State ever claimed that the Catawbas were wards of the Federal Government.

H.R. Rep. No. 910, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News 2671, 2673. It is significant that the State had attempted to secure an extinguishment of the Tribe's treaty claim as a condition to its participation in the 1943 agreement, but that proposal was specifically rejected by the Interior Department.[2]

---

[2]During negotiations of the 1943 Memorandum, the State had sought inclusion of a section that would have extinguished the Tribe's 1763 Treaty Reservation claim. Appeals Record at 287-303. The Department of the Interior had investigated the

(Continued on next page)

Pursuant to the 1943 Memorandum, the State purchased 3,434 acres of land close to the existing 630-acre state reservation and conveyed it to the Secretary of the Interior in trust for the Tribe. The State did not convey the 630-acre tract to the Secretary.

In the 1950's federal Indian policy shifted toward termination of the special relationship between tribes and the United States. Federal funding for the Catawba Tribe decreased, and as a result much of the newly-acquired land could not be productively used for homes or farming. Appeals Record at 337, 339-49. Federal restrictions precluded encumbering the land to secure financing. When the Tribe sought a solution, Interior Department Officials suggested removing federal restrictions from the land and distributing it in fee among tribal members. Appeals Record at 317-36, 339-49.

The Bureau of Indian Affairs (BIA) appointed a Special Program Officer to secure tribal consent to the distribution program. Appeals Record at 483. At no time during the entire legislative process was the Tribe represented by counsel. When Catawba leaders stated they would not agree to dividing the federal assets unless the Tribe's 1763 Treaty claim was preserved, the Program Officer assured them "that any claim the Catawbas had

---

(Continued from previous page)

Tribe's claim, however, and documented the State's failure to abide by the 1840 treaty. Appeals Record at 248. Thus, in 1941, Interior advised the State that it would not "be a party to any action seeking to quiet these claims." Appeals Record at 295. *See* Mem. Sol. Int., Jan. 13, 1942, "Re The Memorandum of Understanding, Etc.," *reprinted in* I Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974. Appeals Record at 304.

against the State would not be jeopardized by carrying out a program with the Federal Government [for the distribution of assets]." Appeals Record at 323. The BIA drafted the Tribe's January 3, 1959 consenting resolution, which was based entirely on the inability of members to "obtain credit to build homes, . . . claim ownership of the property . . . " or to improve or develop the property. Appeals Record at 337. The final clause of the resolution conditioned tribal consent on leaving the claim unaffected:

> . . . nothing in this legislation shall affect the status of any claim against the state of South Carolina by the Catawba Tribe.

Shortly thereafter, the Tribe's Congressman requested the BIA to draft legislation "to accomplish the desires [of the Tribe] set forth in the Resolution." Appeals Record at 338. Two months later, on March 28, 1959, the Congressman presented a draft bill to the Tribe stating that he had had the "legislation drawn up to carry out the intent of the resolution." Appeals Record at 502. Likewise, the Associate Commissioner of Indian Affairs testified to Congress that "we drafted a bill along the lines that we thought the Indians had been discussing." Hearings on H.R. 6128, House Committee on Interior and Insular Affairs (1959) (unpublished).

The House and Senate committee reports are virtually identical and state that the Act's purpose is to "provide for the division of assets of the . . . Tribe . . . among its . . . members. . . . The assets consist principally of the Tribal land which comprises nearly 4,000 acres. . . . " H.R. Rep. 910, *supra*, 1959 U.S. Code Cong. & Ad. News 2672. The committee reports, like the Act itself, do not mention the 1763 Treaty claim. They do, however, plainly

show that Congress was relying on the Tribe's consent expressed in the January 3 and March 28 resolution and meeting. *Id.*

The Committee Reports establish that the relationship that was the object of the 1959 Act was *only* that undertaken pursuant to the 1943 Memorandum of Understanding:

> The Catawba Indians' relations with the Federal Government date back only to the 1940's. . . .
>
> Since 1943 the State, the Bureau of Indian Affairs and the tribe have been working together to improve the economic conditions of the members.

Id. The reports further establish that the only land to be affected by the Act was that acquired pursuant to the 1943 agreement:

> In accordance with the memorandum of understanding, the State bought 3,434.3 acres of land for the Catawbas and by warranty deed dated October 5, 1945, the State conveyed the land to the United States in trust for the tribe. It is this land and the accumulated assets from operating it that will be conveyed under the provisions of the bill.

H.R. Rep. 910, *supra,* 1959 U.S. Code Cong. & Ad. News 2673.

Finally, the formal notice sent by the Secretary of the Interior to the Governor of South Carolina and the Chief of the Tribe demonstrates that the scope of the 1959 Act was limited to withdrawal from the 1943 Memorandum of Understanding:

> NOTICE
>
> Whereas, the Act of September 21, 1959 (73 Stat. 592), provides that special services performed by the United States for Catawba Indians because of their status as Indians shall be terminated on the date of revocation of the tribe's constitution; and
>
> Whereas, the Bureau of Indian Affairs has performed services to the Catawba Indians pursuant to a Memorandum of Understanding entered into with the Tribe and the State of South Carolina on December 14, 1943; and
>
> Whereas such Memorandum of Understanding is to be rendered ineffectual by the Act of September 21, 1959, *supra,* and since no term was agreed upon in the Memorandum of Understanding.
>
> Now therefore, the Secretary of the United States Department of the Interior hereby gives notice of intention to withdraw from and conclude the Department's responsibilities under the agreement approved December 14, 1943.
>
> The effective date of withdrawal shall be July 1, 1962.
>
> (sgd) John A. Carver, Jr.
> Secretary of the Interior

Appeals Record at 350, 544.

Pursuant to the 1959 Act, federal restrictions were removed from the 3,434 acres and the land, or proceeds from its sale, was distributed among tribal members. The Tribe continues to reside to this day on the 630-acre tract held in trust by the State of South Carolina.

REASONS FOR DENYING THE WRIT

I. The Ruling Below Upheld The Federal Government's 1959 Commitment To Allow The Tribe Its Day In Court.

The events leading up to and surrounding enactment of the 1959 Act show clearly that the federal government

expressly agreed that the Act would not be used to deprive the Tribe of the opportunity to present its case to the courts. The Fourth Circuit's ruling construes the 1959 Act in a manner that honors the government's promise. Petitioners seek to have this Court rule that Congress repudiated that agreement without any mention whatsoever, all the while purporting to be acting consistently with the Tribe's wishes and for the Tribe's benefit. As justification for this remarkable result, petitioners raise the specter of untold suffering visited upon thousands of innocent landowners by the mere existence of the tribal claim and the threat of eventual ejectment.[3]

Seen in proper perspective, petitioners' arguments are simply an effort to bar the courthouse door to a Tribe that has never before had the opportunity to present its claim for judicial resolution and which will be left with nothing save a barren 630-acre tract should petitioners prevail.

---

[3]The Tribe sharply disputes petitioners' representations that this claim has placed an "immense burden" of "uncertain title" on "thousands of families and businesses." Petition at 9, n. 14. There is certainly no indication that the Fourth Circuit's ruling on the 1959 Act has resulted in clouded land titles of "whole communities" or "depressed" property values. Petition at 8. On May 8, 1984, nearly 7 months after the Fourth Circuit's panel decision of October 11, 1983, the Rock Hill Evening Herald, published by named defendant Herald Publishing Company, reported that in March 1984 the value of overall construction activity in York County reached its highest monthly total ever, *i.e.*, "476 percent above the levels of a year ago." The massive boost was provided by construction activity within the claim area by another named defendant, Church Heritage Village and Missionary Fellowship. The article also reported that building activity in the City of Rock Hill (also within the claim area) "exceeded March '83 totals by 286 percent." Appendix, Exhibit A, p. 1a.

II. Review At This Time Would Be Premature: The Complaint Has Not Been Answered And A Defendant Class Has Not Been Certified.

This appeal is interlocutory; a defendant class has not been certified and no answers to the complaint have been filed. While petitioners rely heavily on the importance of this case to the affected landowners, no record has been developed as to any economic disruption or hardship caused by this claim to date. The merits of the case have not been reached and petitioners have consistently noted throughout these proceedings that they intend to propound numerous defenses. *See, e.g.*, Petition at 4, n. 7.[4]

Should the Tribe prevail on liability issues, it is likely that a federal court would fashion a remedy that would take into account the "impossibility" of repossession. *See* discussion in Judge Murnaghan's concurring opinion, Petition at 30a, and cases cited.

III. Congressional Policy Is Against Permitting Private Landowners To Be Ejected: Petitioners' Fears Of Armageddon Arising Out Of The Lower Court's Ruling Permitting The Tribe Access To The Courts Are Unfounded Because Congress Will Certainly Settle This Claim If It Proceeds To The Merits.

---

[4]*See also* Appellees' Brief below at 4, n. 6:

> defendants . . . [dispute] whether the Catawbas had any enforceable interest in the land at issue, whether the Catawbas had ever been a tribe under federal law, whether the land at issue could be identified with sufficient precision, whether a proper defendant class could be identified, whether there is an implied right of action under the Nonintercourse Act, whether the United States was notified in advance of the 1840 treaty and consented to it, and whether the Nonintercourse Act covered the Catawbas or the land at issue.

In recent years Congress has been active in settling major Indian land claims by implementing consensual settlement agreements.[5] These legislative settlements have been facilitated by lower federal court rulings that struck down preliminary defenses and to some degree affirmed the legitimacy of the tribal claims.[6] Indeed, the legislative history of each Eastern Indian land claim settlement act attributes the need for the legislation to the perceived credibility of the tribal claim.[7]

The recent experience of the Catawba Tribe demonstrates that its claim, like those of other Eastern Indian tribes, cannot be fairly settled without benefit of judicial interpretation.[8] Should the case now proceed to the merits,

---

[5]*See* Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. § 1701; Maine Indian Claims Settlement Act of 1980, 25 U.S.C. § 1721 (Indian claim to roughly one-half the State of Maine); 1983 Connecticut Indian Land Claims Settlement Act, 25 U.S.C. § 1751.

[6]*See* Narragansett Tribe of Indians v. So. R.I. Land Development Corp., 418 F.Supp. 798 (D.R.I. 1976); Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); Schaghticoke Tribe of Indians v. Kent School Corp., 423 F.Supp. 780 (D.Conn. 1976).

[7]*See* H.R. Rep. No. 95-1453, 95th Cong., 2d Sess. 7-9, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1948; H.R. Rep. No. 96-1353, 96th Cong., 2d Sess. 12-13, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3786; S. Rep. No. 98-222, 98th Cong., 1st Sess. 7-8.

[8]In 1976, in an effort to establish the credibility of the tribal claim without resorting to litigation, the Tribe renewed its 1908 request to the United States to initiate litigation on its behalf to recover the Treaty Reservation. One year later the Solicitor of the Department of the Interior concluded that the Tribe

(Continued on next page)

however, it is likely that settlement efforts will resume and this claim will be settled by Congress as have other Eastern Indian land claims.

IV. The Ruling Below Will Not Create Uncertainty As To Other Terminated Tribes Or Indians.

A. This Court and Other Lower Courts Have Already Established That Treaty-Protected Property Rights May Survive Termination.

Petitioners urge that review be granted because the decision below may permit terminated Indians to assert federal Indian rights. However, no uncertainty is created by the opinion below because this Court has already ruled that termination does not necessarily extinguish treaty property rights that are not necessarily or expressly included within the scope of the termination legislation. *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (termination act's general application of state law insufficient to accomplish extinguishment of treaty right to hunt and fish free of state law). Lower court decisions have

---

(Continued from previous page)

could establish a prima facie Nonintercourse Act claim and formally requested the Department of Justice to initiate legal action—but only in the event that efforts already underway to reach "an amicable, orderly settlement" should fail. District court record, Jan. 20, 1981, N.R. 10, Vol. I, p. 4, Attachment to Plaintiff's Memorandum in Response to Defendants' Memorandum in Response to Status Conference Order. Appendix, Exhibit B, p. 3a. Thereafter, two tribal settlement initiatives, resulting in detailed settlement proposals very similar to those enacted by Congress for other Eastern Indian tribes, see n. 5, *supra*, were rejected. Hearings on H.R. 3274, Hse. Comm. on Interior and Insular Affairs, 96th Cong., 1st Sess. 30-36, June 12, 1979; Hearings on H.R. 5494, Hse. Comm. on Interior and Insular Affairs, 97th Cong., 2d Sess., June 22, 1982 (unpublished).

followed this Court's ruling in *Menominee*. *Kimball v. Callahan*, 493 F.2d 564 (9th Cir.), *cert. denied*, 419 U.S. 1019 (1974) (Klamath Indian treaty rights to hunt and fish free of state regulation survive termination); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. denied sub nom., United States v. Oregon*, — U.S. —, 52 U.S.L.W. 3906 (1984) (Klamath Indian treaty water rights survive termination).

B. The Fourth Circuit's Construction Of The 1959 Act Turns On Unique Historical Facts And Circumstances.

The ruling below turns on the unique history of the Catawbas' 16-year relationship with the federal government and the particular actions and assurances of the drafting agency and the bill's sponsor. No other terminated tribe had so brief and limited a relationship with the United States. The 1943 Agreement was limited to merely providing economic assistance to rehabilitate tribal members and the Tribe's treaty claim was intentionally left outside the scope of that relationship. The 1959 Act was likewise limited, not only by virtue of the limited nature of the obligations undertaken in 1943, but also by the assurances of the Bureau of Indian Affairs, the expressed understanding of the Tribe, the assurances of the Act's sponsor, and the reliance expressed by Congress on the understanding and consent of the Tribe. These are factors that are unique to the 1959 Catawba Act and form an integral basis of the decision below.

C. The Ruling Below Turns On Unique Statutory Language.

The language of the Catawba Division of Assets Act was unique in several respects that would preclude appli-

cation of the Fourth Circuit's construction to other terminated tribes. The Fourth Circuit held that the relevant provisions of § 5 of the 1959 Act applied only to individual Catawba Indians and not to the Catawba Tribe. Thus, the applicability of the Nonintercourse Act to *tribal* treaty rights was not affected by the provision that states "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them." 25 U.S.C. § 935. This holding is unlikely to have application beyond the present case because the language rendering Indian statutes inapplicable in each of the other termination acts is significantly different from that in the Catawba Act.

In eight of the twelve termination acts, Congress specifically provided that federal Indian statutes "shall no longer be applicable *to the members of the tribe.*"[9] Plainly, the result for those tribes would be identical to that reached by the Fourth Circuit here without regard to the ruling in this case. In the Alabama-Coushatta and Ponca termination acts, Congress expressly provided that federal Indian statutes would no longer apply to *both* the tribe and its members.[10] Once again, the Fourth Circuit's analysis of § 5 of the Catawba Act would appear to have

---

[9]25 U.S.C. §§ 564q; 677v; 703; 757(a); 803; 823; 848 and 899 (emphasis added).

[10]In the Alabama-Coushatta Act, Congress provided that federal Indian statutes "shall no longer be applicable to the Alabama-Coushatta Tribes of Texas or the members thereof . . ." 25 U.S.C. § 726. In the Ponca Act, Congress provided that "all statutes of the United States that affect Indians or Indian tribes because of their Indian status shall be inapplicable . . ." 25 U.S.C. § 980.

no application.[11] In the 1958 California Rancheria Act, the only termination act containing language identical to that in the 1959 Catawba Act rendering federal Indian statutes inapplicable, the entirety of the comparable section deals only with individual Indians. Section 10(b), 72 Stat. 619, 621. *See* n. 12, *infra.*

Similarly, the clause in § 5 of the Catawba Act that applies state law is significantly different from that contained in any other termination act. In each of the nine other termination acts that affected both an Indian tribe and is members,[12] Congress expressly provided that state laws would thereafter apply to *both* the affected "tribe and its members" in the same manner as they apply to

---

[11]Assuming *arguendo* that § 5 of the Catawba Act rendered federal Indian statutes inapplicable to both the Catawba Tribe and its members, it does not follow that Nonintercourse Act restrictions on the Tribe's Treaty Reservation were thereby lifted. This Court has held that a similar section of the Menominee Termination Act, 25 U.S.C. § 899, that rendered federal Indian statutes inapplicable and state law applicable, was limited to the withdrawal of federal supervision only. Menominee Tribe v. United States, 391 U.S. 404 (1968). In each termination act, Congress lifted federal restrictions on the lands subject to the act in a different section from that ending federal supervision. Thus, Congress lifted federal restrictions on the lands to be affected by the Catawba Act in § 4 of that Act, 25 U.S.C. § 934, and ended federal supervision in § 5.

[12]Two termination acts were directed primarily at individual Indians, not Indian tribes. The Mixed-Blood Ute Termination Act, 25 U.S.C. § 677, terminated certain tribal members but left the Ute Tribe and its full-blood members largely unaffected. The comparable section of the California Rancheria Act dealt exclusively with individual Indians. 72 Stat. 619, § 10(b). *See* S. Rep. No. 1874, 85th Cong., 2d Sess. 3 (1958) (Membership rolls not prepared because "groups not well-defined," "lands . . . for the most part . . . acquired . . . by United States for Indians in California generally rather than for a specific group . . . ," and assets distributed according to plans developed or approved by "administratively selected users of the land.").

other citizens or persons.[13] In the 1959 Act, however, Congress provided that state law would thereafter apply to "them," referring only to individual Catawba Indians. 25 U.S.C. § 935.[14]

---

[13]*See* 25 U.S.C. §§ 564; 703; 726; 757; 803; 823; 848; 899 and 980.

[14]That the applicability of the relevant clauses of § 935 was limited to individual Indians is demonstrated by comparing the 1959 Catawba Act with its immediate predecessor, the 1958 California Rancheria Act, 72 Stat. 619, and its immediate successor, the 1962 Ponca Termination Act, 25 U.S.C. §§ 971-980. Section 10(b) of the California Rancheria Act (the provision comparable to § 935 of the Catawba Act) by its terms applies only to individual Indians. Appendix, Exhibit C, p. 7a. There, Congress used the language "all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them." In contrast, the comparable provision of the 1962 Ponca Termination Act, 25 U.S.C. § 980 (Appendix, Exhibit D, p. 8a), applies to both individual Indians and Indian Tribes. Thus, Congress used the language "all statutes of the United States that affect Indians *or Indian tribes* because of their Indian status shall be inapplicable to them." (Emphasis added). If Congress had intended the term "Indians" to encompass "Indian tribes," there would have been no need to insert the words "or Indian tribes" in the second sentence of § 980.

When § 5 of the 1959 Catawba Act (Appendix, Exhibit E, p. 8a) is compared with these two acts, it becomes apparent that Congress selectively applied only the first sentence and the first clause of the second sentence of § 5 to the Catawba Tribe. Section 5 of the Catawba Act, like § 10(b) of the California Act, provides that "all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them." Indeed, with the exception of the description of who shall henceforth be ineligible for federal services, the relevant provisions of the Catawba Act are identical to those of the 1958 California Act, which by its terms applies only to individual Indians.

In 1962, when Congress sought to further broaden the applicability of the section and ensure that the Ponca Tribe, as well as its members, would be included among those to whom Indian statutes would no longer be applicable and to whom

(Continued on next page)

D. The Catawba Tribe Was The Only Eastern Indian Tribe To Be Terminated And Congress Has Restored The Trust Relationship To Most Of The Western Terminated Tribes.

The Catawba Tribe was the only Eastern Indian Tribe to be terminated. Of the remaining 11 western termination acts, only nine were directed primarily at both tribes and their members. Since 1973, Congress has restored the federal trust relationship to the tribes and Indians affected by six of these termination acts. *See* 25 U.S.C. §§ 903 (Menominee); 861 (Wyandotte, Ottawa, Peoria); 761-768 (Southern Paiute); 711 and 713 (Siletz and Grand Ronde, the principal tribes affected by the Western Oregon Termination Act).

E. The Catawba Termination Act Was Enacted Under A Revised Policy That Emphasized The Understanding And Consent Of The Affected Indians.

The precedential applicability of the ruling below to other terminated tribes is further eroded by the fact that

---

(Continued from previous page)

state law would apply, it specifically included the words "or Indian tribe" after the word "Indians."

This analysis is confirmed by comparison of the final sentences of each of the sections quoted above preserving the citizenship status of individual Indians under the Indian Citizenship Act of June 2, 1924, ch. 233, 43 Stat. 253. Both the California and Catawba Acts leave the citizenship status of "such persons" unaffected. "[S]uch persons" necessarily refers to the individuals in the preceding sentence to whom state law would henceforth apply. In the Ponca Act, however, because federal Indian statutes had been rendered inapplicable and state law made applicable to "Indians or Indian tribes," Congress was unable to refer to the subject of the previous sentence to protect the citizenship rights of individuals as it had done in the California and Catawba Acts. Rather, it was necessary to refer to the citizenship status of "any Indian."

the 1959 Catawba Act was enacted pursuant to a modified, softened federal termination policy. In 1958 Congress and the Eisenhower administration rejected the coercive termination policy that underlay the first nine termination acts passed by Congress in 1954 and 1956. F. Cohen, *Handbook of Federal Indian Law* 182 (1982 ed.). The revised policy placed special emphasis on both the Indians' understanding and consenting to termination, *id.* Thus, unlike earlier termination acts, Congress expressly conditioned implementation of the final three termination acts on the formal consent of the affected Indians or tribes. *See* 72 Stat. 619, § 2(b) (California Rancheria, 1958); 25 U.S.C. § 931 (Catawba, 1959); 25 U.S.C. § 971 (Ponca, 1962).[15]

---

[15]The 1959 Catawba Act was further unique in that the expressed congressional purpose of every other termination act that affected both tribes and their members was, *e.g.*, "to provide for the *termination* of Federal supervision over the trust and restricted property of the . . . Tribe . . . ." 25 U.S.C. § 564 (emphasis added); see 25 U.S.C. §§ 691; 741; 791; 821; 841; 891; H.R. Rep. No. 2491, 83d Cong., 2d Session. 1, *reprinted in* 1954 U.S. Code Cong. & Ad. News 3119; and H.R. Rep. No. 2076, 87th Cong., 2d Sess. 1 (1962). In contrast, the stated purpose of the 1959 Act was "[t]o provide for the division of the tribal assets of the Catawba Indian Tribe . . . "73 Stat. 592; H.R. Rep. No. 910, *supra*. Indeed, neither the word "terminate" nor any of its derivations appears once in the Catawba Act as it does in each of the other termination acts. See 73 Stat. 592. While the Tribe does not argue therefrom that the Catawba Act is not a "termination" act, it certainly suggests that Congress legislated with the particular circumstances of the Catawba Tribe in mind and further weakens the link between the 1959 Act and the assimilationist policy pronouncements attending the advent of the termination era in the early 1950's. *See* Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 663 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977), *quoted with approval in* Bryan v. Itasca County, 426 U.S. 373, 388, n. 14 (1976) ("Courts 'are not obliged in ambiguous instances to strain to implement [an assimilationist] policy Congress has now rejected . . .' ").

V. The Ruling Below Does Not Conflict With Decisions Of This Court Or Other Courts Of Appeals: No Court Has Ever Held That Termination Extinguishes Or Diminishes An Undistributed Tribal Property Right.

Each of the decisions with which the opinion below is alleged to conflict involved either the status of individual Indians[16] or the application of state law to the distributed or allotted property of individual Indians.[17] However, the

---

[16]In United States v. Antelope, 430 U.S. 641 (1977), this Court commented that individual terminated Indians are subject to state criminal laws. In Bryan v. Itasca County, 426 U.S. 373, 389 (1976), this Court noted that termination acts subjected Indians, as individuals, as well as their "distributed property . . . 'to the same taxes . . . as in the case of Non-Indians.'" United States v. Heath, 509 F.2d 16 (9th Cir. 1974), involved the status of an individual Indian for purposes of a criminal prosecution.

[17]In Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972), this Court held that the Ute termination act, 25 U.S.C. § 677, ended federal responsibility for individual Indian property (stock shares) that had been distributed under the act. "The UDC stock itself, however, was free of restriction; as to it, federal termination was complete." 406 U.S. at 150. Taylor v. Hearne, 637 F.2d 689 (9th Cir.), *cert. denied*, 454 U.S. 851 (1981) also involved application of state law to the distributed property of an individual Indian.

Schrimpscher v. Stockton, 183 U.S. 290 (1902), likewise involved the application of state law to determine rights in the allotted lands of an individual Indian, as did Dickson v. Luck Land Co., 242 U.S. 372 (1917); Dennison v. Topeka Chambers Indus. Dev. Corp., 724 F.2d 869 (10th Cir. 1984); and Dillon v. Antler Land Co., 507 F.2d 940 (9th Cir. 1974), *cert. denied*, 421 U.S. 992 (1975). *Compare* Capitan Grande Band of Mission Indians v. Helix Irrig. Dist., 514 F.2d 465 (9th Cir. 1975), *cert. denied*, 423 U.S. 874, where the Ninth Circuit expressly declined to follow its *Dillon* ruling and refused to apply state statutes of limitations to tribal property. "Our recent decision in Dillon . . . is distinguishable in that it involved the applica-

(Continued on next page)

Fourth Circuit in this case did not hold, and the Tribe has never contended, that state law does not now apply to individual Catawba Indians as well as to any former tribal property that was the subject of and actually distributed pursuant to the 1959 Act. No conflict in decisions exists because the right at issue in this case is a *tribal* right to *undistributed* property intentionally left outside the scope of the 1959 Act. No decision of this Court or a court of appeals has ever held that termination legislation resulted in the extinguishment of treaty property rights or the

---

(Continued from previous page)

tion of Montana statutes of limitations to land owned by an Indian in fee simple, which had lost its character as a trust property interest entitled to federal protection." 514 F.2d at 468, n. 6.

This Court and Congress have consistently distinguished between lands allotted to Indian individuals and undivided tribal property. In 1834 Congress removed the lands of individual Indians from federal protection under the Nonintercourse Act. Jones v. Meehan, 175 U.S. 1, 12 (1899). Because allotted lands are destined to eventually become unrestricted private property, they assume many of the incidents of state law prior to the final lifting of federal restrictions. Thus, absent an allegation of jurisdiction under 25 U.S.C. § 345, the right of possession of a restricted allotment is a matter for state courts. Taylor v. Anderson, 234 U.S. 74 (1914). The question of *tribal* rights to land, however, is exclusively federal in nature. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). In *Oneida* the Court explained the distinction between individual Indian land and tribal land for federal jurisdictional purposes:

> In Taylor [v. Anderson], the plaintiffs were individual Indians, not an Indian Tribe; and the suit concerned lands allocated to individual Indians, not tribal rights to lands . . . Individual patents had been issued with only the right to alienation being restricted for a period of time . . . Once patent issues, the incidents of ownership are, for the most part, matters of local property law . . .

Id. at 676 (citations omitted).

termination of reservation status of undistributed tribal lands left unaffected by the act.[18]

However, in *Menominee Tribe of Indians v. United States,* 391 U.S. 404 (1968), this Court did construe a provision similar to § 935 of the Catawba Act and squarely ruled that Congress did not intend the meaning asserted by petitioners here. *Menominee* rejected arguments that the general application of state law, in that case, to both "the tribe and its members," 25 U.S.C. § 899, resulted in an extinguishment of the treaty property right to hunt and fish free of state law. The Menominee Termination Act mentioned neither preservation nor extinguishment of the right and this Court held that the Act's general application of state law was insufficient to accomplish an indirect abrogation. The *Menominee* Court specifically held

---

[18]See Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 139 (1972); "The termination proclamation . . . did not purport to terminate the trust status of the undivided assets. Cf. Menominee Tribe v. United States . . ." The *Affiliated Ute* Court further noted that the termination proclamation, "[t]*o the extent the nature of the property so permitted,* . . . marked the fulfillment of the purpose set forth in § 1 of the Act, 25 U.S.C. § 677, namely, the termination of federal supervision over the trust and restricted property of the mixed-bloods." 406 U.S. at 149-150 (emphasis added). The Court's analysis of the legislative scheme of the Ute termination act likewise fully supports the Fourth Circuit's ruling in this case:

> After each mixed-blood had received his distributive share, directly or in whole or in part through the devise of a corporation or other entity in which he had an interest, *federal restrictions were to be removed except as to any remaining interest in tribal property,* that is, *the unadjudicated or unliquidated claims* against the United States, gas, oil, and minerals rights, *and other tribal assets not susceptible of equitable and practicable distribution.* § 16, 25 U.S.C. § 677o.

406 U.S. at 135 (emphasis added).

that the provisions of § 899 of the Menominee Act providing for application of state law and inapplicability of federal Indian statutes were limited in their application to the withdrawal of federal supervision, 391 U.S. at 412.[19]

Indeed, every court that has examined the apparently broad application of state law provisions contained in termination-era legislation has construed the provisions narrowly to accomplish only the particular purposes of the act. In *Bryan v. Itasca County,* 426 U.S. 373 (1976), this Court construed the section of Public Law 280 directing that state civil laws "of general application to private persons or private property shall have the same force and effect within Indian country as they have elsewhere within the State . . .," 28 U.S.C. § 1360(a). At issue was the applicability of state personal property tax laws to the property of individual Indians located on restricted trust land. This Court unanimously held that § 1360(a) did not subject Indians to all state laws of general application. Rather, after examining the legislative history and overall purpose of the Act, and carefully distinguishing between the effects of the Act on tribes and its effect on individual

---

[19]The distinction between the termination of federal supervision over individual Indians and the abrogation of treaty rights by application of state law to tribal property left outside the scope of the termination act is drawn clearly by two Ninth Circuit decisions construing the Klamath Termination Act. In Kimball v. Callahan, 493 F.2d 564 (9th Cir.), *cert. denied,* 419 U.S. 1019 (1974), the court held that the general application of state law to "the tribe and its members" did not extinguish the undistributed tribal right to hunt and fish free of state law. Shortly after *Kimball,* the Ninth Circuit decided United States v. Heath, 509 F.2d 16 (1974), and held that the termination act's general application of state law did extinguish the federal Indian status of an individual Klamath Indian for purposes of criminal prosecution.

Indians, 426 U.S. at 389, it was determined that § 1360(a) was limited to applying state law as rules of decision in state court private civil legal disputes.[20]

VI. The Fourth Circuit's Interpretation Of The 1959 Act Follows Well-Established Rules Of Construction.

Petitioners claim that the 1959 Catawba Act is so clear on its face as to preclude reliance on anything other than the language of the statute itself. However, because the Act does not mention this claim or the Tribe's Treaty Reservation, the Fourth Circuit applied this Court's mandate that "[a] congressional determination to terminate must be expressed on the face of the act or be clear from the surrounding circumstances and legislative history." *Mattz v. Arnett*, 412 U.S. 481, 505 (1973).[21] The ruling be-

---

[20]See Capitan Grande Band of Mission Indians v. Helix Irrigation District, 514 F.2d 465 (9th Cir. 1975), *cert. denied*, 423 U.S. 874, where the appeals court held that the same Public Law 280 provision did not apply state statutes of limitations to bar a *tribal* claim for trespass damages on reservation land.

[21]The Fourth Circuit's narrow construction of the word "Indians" in § 5 of the Catawba Act is required by this Court's refusal "to infer an intent to terminate." *Mattz, supra*, at 504. Petitioners attack the lower court's construction of "Indians," however, on the basis that Congress used the words "Indians" and "Indian tribes" interchangeably in the 1834 Trade and Intercourse Act. Petition at 22-24. But whether Congress may have so used the terms in 1834 is irrelevant. It is clear that Congress in 1834 removed the lands of individual Indians from Nonintercourse Act protection, Jones v. Meehan, 175 U.S. 1, 12 (1899), and that therefore the Act under which the Catawba Tribe is now proceeding is an act that protects only the lands of Indian tribes. At issue here is whether Congress *in 1959* distinguished between how termination would affect Indians as individuals and Indian tribes. Even a cursory examination of the language of each termination act discloses that Congress expressly and consistently distinguished between "Tribes" and "Indians." *See* Section IV C, *supra*.

low recognized that absent expression of contrary intent by Congress, the clear intent of the bill's drafting agency and sponsor to leave this claim unaffected controls. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 656-58 (1976) ("[N]othing in the legislative history shows any congressional purpose not to follow the Secretary's proposal [that honors the Tribe's request] . . .")

The Fourth Circuit understood that even if the 1959 Act does not expressly preserve the tribal claim, it is, at the very least, ambiguous. *See* Section IV C, *supra*. The Fourth Circuit properly examined and considered the surrounding circumstances, *i.e.*, that 1) the division of the Tribe's assets was conceived of and proposed by the federal government; 2) the Tribe was not represented by counsel; 3) the Tribe conditioned its consent on leaving this claim unaffected and was assured that the bill did not affect the claim; 4) the Interior Department, the Congressman and Congress itself purported only to be acting for the Tribe's benefit and in accord with tribal desires, and 5) the Act was enacted in accordance with a revised termination policy that emphasized tribal understanding and consent. Under these circumstances, it is difficult to conceive of a more appropriate case in which to apply this Court's directive that:

> statutes ratifying agreements with the Indians [are] not to be construed to their prejudice . . . . In *Choate v. Trapp, supra*, also a case involving a ratifying statute, the Court stated: "The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith."

Antoine v. Washington, 420 U.S. 194, 199-200 (1975) (citations omitted). Indeed, the Catawba Tribe referred to the bill they were approving only as "the Contract that was drawn up by the Bureau of Indian Affairs."[22]

Petitioners' suggestion that the Catawba Tribe intended only to preserve a state law claim, as opposed to their federal Nonintercourse Act claim (Petition at 21) is not credible in light of the Tribe's circumstances in 1959. Moreover, the Tribe's 1959 resolution sought to preserve "*any* claim" and the Tribe had twice petitioned the Department of the Interior based on the Nonintercourse Act. Finally, the suggestion that Congress intended to transform what had theretofore been a claim within "the exclusive province of the federal law," *Oneida Indian Nation, supra,* 414 U.S. at 667, into a state law claim is equally implausible.[23] Such an anomalous result could be expected to receive at least passing mention in the Act or its legislative history.

CONCLUSION

Petitioners' projections of the consequences of permitting the Tribe access to the courts are overstated and are unwarranted in light of current congressional policy.

[22]Tribal minutes of March 28, 1959 meeting with Congressman Hemphill and Bureau of Indian Affairs. Appeals Record at 504.

[23]Petitioners' statement that the Tribe in the district court argued that Congress was aware only of a possible state law claim is flatly incorrect. That argument was first made by petitioners before the Fourth Circuit in their Petition for Rehearing at p. 8.

Denial of the Petition would mean only that the courthouse doors would be open to the Tribe, consistent with the federal government's assurance in 1959 that the Division of Assets Act would not be used to affect this claim. If the case proceeds to the merits, then Congress will no doubt settle this claim as it has the land claims of other Eastern tribes. Even in the absence of congressional action, a federal court would almost certainly fashion a remedy that would be just to all parties.

Because the ruling below turns on unique facts and unique statutory language, it will have little, if any, impact on the rights of other terminated tribes, most of whom have been restored to federal status. Finally, the Fourth Circuit's holding is fully consistent with opinions of this Court and other circuit courts. No court has ever construed a termination act to extinguish tribal property rights or implicitly terminate tribal rights left outside the scope of the act. This Court has held, however, that a termination act's general application of state law does not work to backhandedly extinguish treaty property rights and that a provision similar to the one on which petitioners rely is limited in its application to the withdrawal of federal supervision.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Don B. Miller
Counsel of Record

Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

JEAN H. TOAL
BELSER, BAKER, BARWICK, RAVENEL,
TOAL & BENDER
1213 Lady Street, Suite 303
Columbia, SC 29211
(803) 799-9091

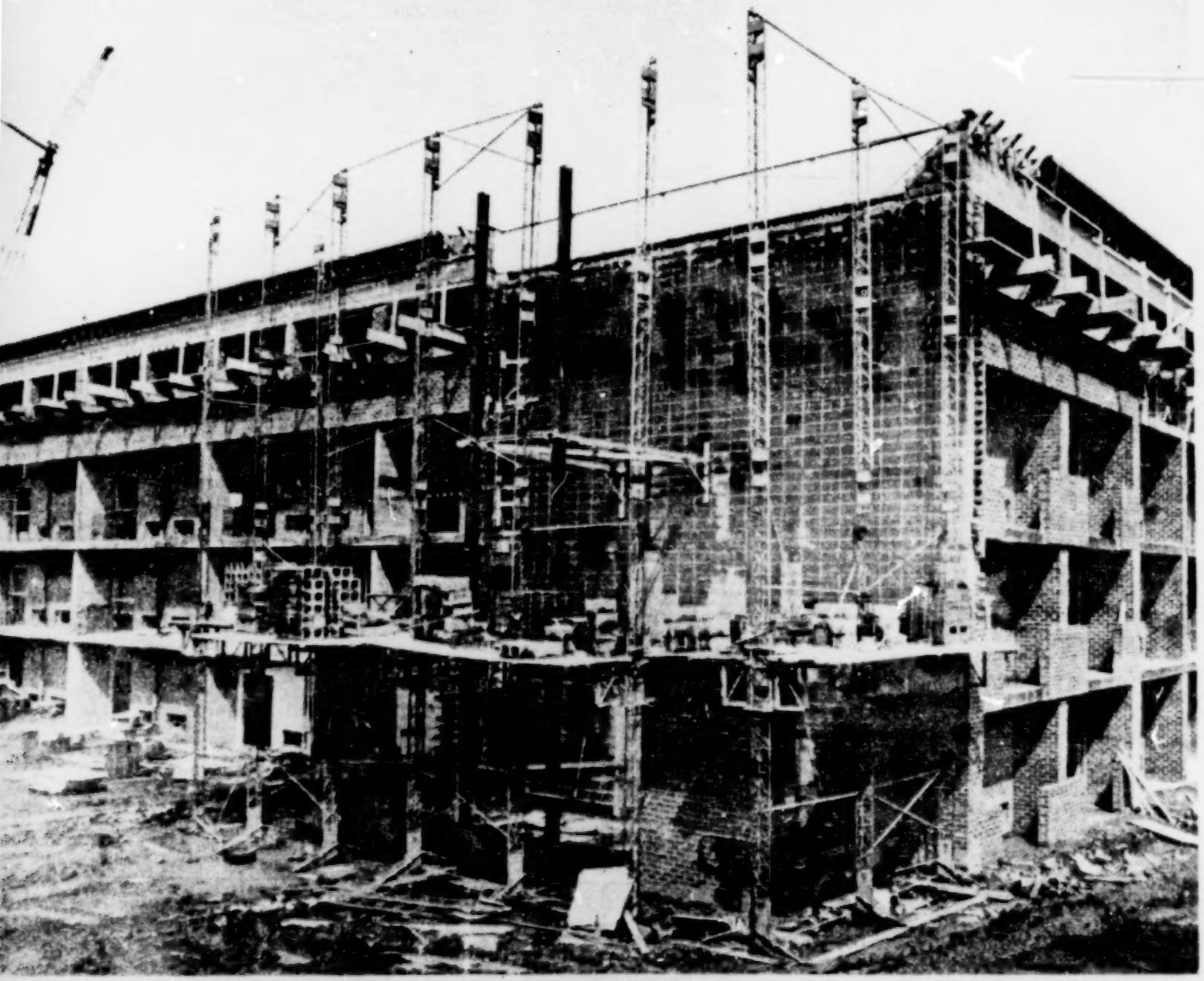
ROBERT M. JONES
123 Workman Street
Rock Hill, SC 29730
(803) 327-1179

MIKE JOLLY
RICHARD STEELE
113 West Main Street
Union, SC 29379
(803) 427-8471

APPENDIX

s Office: 132 W. Main St., Rock Hill, S.C. Phone 32[illegible]4000 Tuesday, May 8, 1984 — Price 25¢

PTL construction boosts county to record $30 million for month



Evening Herald photo by Andy Burriss

CONSTRUCTION UNDER WAY ON PTL GRAND HOTEL
504-room building to be finished by August

By DAVID HARRIS
Evening Herald staff writer

Work that began earlier this spring on the $24.48 million PTL Grand Hotel at Heritage USA boosted the March value of overall construction activity in York County to its highest monthly total ever.

The 504-room, 413,200-square-foot PTL project includes a four-story brick and block hotel building, three-story shopping mall called Main Street USA, and a business area with convention room.

Also under construction are a restaurant at the Victorian-style hotel and additional dining facilities in the business area.

The religious organization expects to complete the project in August. PTL already is booking conventions of Christian-related organizations, spokesman Brad Lacey said.

"We're 100 percent booked for the opening of the hotel," Lacey said.

The project inflated countywide construction totals to $30.18 million during March, easily surpassing the previous record monthly total of $16.7 millon in January 1982, when construction began on Piedmont Medical Center in Rock Hill.

Even excluding the PTL project, the total value of building permits issued in York County during March was 48 percent higher than that of permits issued in February. The gain over March '83 was 8.8 percent.

With the PTL project included, the value of building permits was a whopping 476 percent above the levels of a year ago, and 666 percent higher than permits issued during February.

Other major projects begun in March in unincorporated areas of the county included a $221,670 expansion of the Econo Lodge on Riverview Road, Rock Hill. A 20-room, two-story wing is being added to the motel, owned by Natu Patel.

See YORK, page 11

2a
EXHIBIT A
(Continued)

York County building value sets record with PTL hotel

Continued from page 1

Construction in unincorporated areas also included 31 new homes valued at a collective $1.77 million and five duplex apartments worth $191,833.

Building activity was also on the upswing in some incorporated areas, particularly the city of Rock Hill, where the value of permits exceeded March '83 totals by 286 percent. The increase over the previous month was 141 percent.

Major projects in the city included the Medical Center office complex at 200 Herlong Ave. Atlanta developer Marshall Erdman and Associates is building the 26,000-square-foot building, which will house offices for nine doctors. The value listed on the building permit is $683,200.

Also, developer Bill Brewer is adding 19 units, valued at a total $230,400, to the Willowbrook Development off Willowbrook Avenue.

Permits were issued for 13 new homes in Rock Hill during the month.

Activity in York and Fort Mill was down from a year ago — a 20 percent drop in York and a 43 percent decrease in Fort Mill.

But building activity in both cities increased over the previous month's levels. The increase over the value of February permits was 30 percent in York and 142 percent in Fort Mill. All York permits were for renovations to existing building.

Construction was begun on five new homes in Fort Mill during the month, with four of those located on Jason Court, built by the Parkline Development Corp. of Rock Hill.

In Clover, new construction increased by 123 percent from March '83 and 146 percent from February.

New construction in Chester County increased by 37 percent from a year ago, and by 9 percent from the previous month.

Major projects included Heilig Meyers Furniture Co.'s $100,000 renovation of the old TG&Y building at Cestrian Square.

Permits were issued during the month for five new homes and four apartments in Chester County, which issues permits for incorporated and unincorporated areas.

EXHIBIT B

(SEAL)

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

Honorable James W. Moorman
Acting Assistant Attorney General
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

Dear Mr. Moorman:

This letter constitutes a request for your Department to institute legal action on behalf of the Catawba Indian Tribe to recover its reservation in South Carolina. The issue in this litigation is whether South Carolina's attempt to acquire title to the Catawba reservation by virtue of an 1840 Treaty was valid under the Non-Intercourse Act, 25 U.S.C. § 177. We conclude that the Tribe can establish a prima facie case under the Non-Intercourse Act, that the 1840 Treaty was void, and that the Tribe is therefore entitled to recovery of its reservation.

The Catawba claim is for approximately 140,000 acres (or 15 miles square) to which they have had a vested property right since 1763. Prior to that date, the Tribe occupied and controlled a much larger area by aboriginal title. However, in 1763, the Tribe relinquished their claim to the larger area in return for Great Britain's assurance that they would have unmolested possession of the 15 mile square reservation. When the United States succeeded to Great Britain's sovereignty in 1783, our new government did not abrogate the 1763 Catawba Treaty. Therefore,

according to settled rules of international law, which are acknowledged by the U.S. Supreme Court, the Catawba retained a vested right in their reservation, as sacred as the fee simple of a non-Indian, which the United States Government was bound to respect. See *Mitchel v. United States,* 9 Pet. (34 U.S.) 711, 733 (1835).

The successive Non-Intercourse Acts, enacted to protect Indian property by requiring federal consent to the attempted conveyance of any Indian lands, were as applicable to the Catawba reservation as to any other kind of tribally held land. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 528 F.2d 370 (C.A. 1 1975). By 1840, the Catawba's treaty reservation was overrun by non-Indians who continually ignored the Tribe's protests; non-Indians also occupied the reservation lands under a state instituted leasing system whereby the lessees owed rent to the Catawba but often did not pay it. In 1840, the Tribe finally purported to convey their remaining title and interest in the 140,000 acres to the State of South Carolina by treaty. The federal government was in no way involved in the negotiations and never subsequently gave its consent. The 1840 conveyance was therefore void under the Non-Intercourse Act. Shortly after the 1840 Treaty, the Tribe sought return of the reservation stating the Treaty was procured by duress, that the terms were unfair and that the State wasn't meeting its obligations under the Treaty. Under the Non-Intercourse Act, the United States, as protector of Indian held lands, had the duty to protect the Catawba reservation, to set aside the 1840 Treaty if it didn't consent to it, and to assist the Catawba in recovering their lands. *Passamaquoddy, supra.*

The United States has never taken any action to fulfill its duty to help the Catawba recover the land. In fact, the Department of the Interior has twice refused, in 1906 and 1908, to take action when the Tribe's lawyers pointed out the Tribe's claims under the Non-Intercourse Act. But mere lapse of time and failure of the federal government to act cannot eradicate either the Catawba's rights to their land or the federal government's continuing duty to help them get it back. The Act of September 21, 1959, which terminated federal services to the Catawba and the applicability of federal Indian statutes similarly did not extinguish the 1840 Treaty claim or the government's duty of protection. The termination language in that 1959 statute is *prospective* and does not affect pre-existing legal rights. Moreover, the Supreme Court in *Menominee Tribe v. U.S.*, 391 U.S. 404 (1968), and in many other Indian land cases, required clear evidence of Congressional intent before finding an abrogation of Indian rights. The legislative history of the 1959 Act shows that Congress, as well as the administering agency, believed the Act was passed for one reason—to liquidate a 3400 acre reservation and to terminate limited federal benefits both of which were created by a 1943 agreement between the Tribe, the State of South Carolina, and the Department of the Interior. In short, the 1959 Act was a means of dissolving the legal relationship set up by that 1943 agreement. In fact, Congress was unaware of the status of the 1763 treaty reservation, of the Non-Intercourse claim pertaining to it, and finally of its own duty under the Non-Intercourse Act to protect the reservation. The Tribe itself certainly did not contemplate the 1959 Act as a means of cutting off their legal claims to the 1763 reservation because they

stipulated, in the petition which gave rise to the 1959 legislation, that those claims should not be affected.

The action we hereby recommend is that the United States finally act upon its long neglected duty under the Non-Intercourse Act to nullify the 1840 Treaty with South Carolina and restore possession of the 1763 Treaty reservation to the Catawba Tribe.

An alternative source of the United States' duty to bring this suit to quiet title to the 1763 reservation arises from the 1959 Act itself. Since 25 U.S.C. § 935 did not abrogate the Catawba's Non-Intercourse Act claim, the 1763 reservation might be a tribal asset subject to the distribution provisions of 25 U.S.C. § 933, as was the known 3400 acre reservation. It would therefore be incumbent upon the Secretary, under § 933, to bring legal action to settle ownership of the 15 mile square reservation so that he could later determine whether that reservation should be conveyed to tribal members under § 933(d) or sold pursuant to § 933(f).

We recommend that the appropriate cause of action be a suit for ejectment of the current possessors of the tract and mesne profits for the period of time the Tribe has been dispossessed. This is the third time the Catawba Tribe has petitioned the Department to seek relief on their behalf and they have been twice refused for legally incorrect reasons. The attached materials include legal research by our staff attorneys and historical materials that should aid in your preparation of the case.

We recommend that you meet with us as soon as possible, and with the Tribe's representatives, to discuss the handling of the claim. The Tribe has already held several

meetings with the South Carolina Governor and Attorney General to discuss settlement of the claim. We understand that discussions have reflected a mutual intent to resolve the matter in a way that would satisfy the parties without endangering the State's economy or interfering with the orderly development of residential and industrial real estate. Since we agree with that approach, we should inform all concerned parties that we concur in the validity of the Catawba claim, that we would prefer an amicable, orderly settlement to lengthy, disruptive litigation, and that we will lend immediate assistance in negotiations for a just and model settlement.

Sincerely,

Solicitor

Attachments

EXHIBIT C

§ 10(b) of the Act of August 18, 1958
72 Stat. 621

(b) After the assets of a rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in this Act, however, shall affect the status of such persons as citizens of the United States.

EXHIBIT D

25 U.S.C. § 980

When the distribution of tribal assets in accordance with the provisions of sections 971-980 of this title has been completed, the Secretary of the Interior shall publish in the Federal Register a proclamation declaring that the Federal trust relationship to such tribe and its members has terminated. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians or Indian tribes because of their Indian status, all statutes of the United States that affect Indians or Indian tribes because of their Indian status shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in section 971-980 of this title, however, shall affect the status of any Indian as a citizen of the United States. Pub.L. 87-629, § 10, Sept. 5, 1962, 76 Stat. 431.

EXHIBIT E

25 U.S.C. § 935

The constitution of the tribe adopted pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended, shall be revoked by the Secretary. Thereafter, the tribe and its members shall not be entitled to any of the special services performed by the United States for Indians because of their status as Indians, all statutes of the United States that affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States

shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction. Nothing in sections 931-938 of this title, however, shall affect the status of such persons as citizens of the United States. Pub.L. 86-322, § 5, Sept. 21, 1959, 73 Stat. 593.